84-246

No. _____

Office Supreme Court, U S
FILED
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ALEXANDER L. STEVAS
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

THOMAS R. ANGEL and LORETTA C. ANGEL,

Petitioners,

vs.

SUPERIOR COURT OF SAN DIEGO COUNTY,
ANTHONY C. JOSEPH, JUDGE

Respondent,

Louis H. Renn

Real Party in Interest.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CALIFORNIA

This Petition is taken pursuant to Section 1257(3) of Title 28 of the United States Code.

THOMAS R. ANGEL and
LORETTA C. ANGEL
Post Office Box 753
Rancho Santa Fe, California 92067
Telephone: (619) 755-7258

Petitioners pro se

76pp

QUESTIONS PRESENTED

1. The Courts invoking of the doctrine of Res Judicata against petitioners pursuant to the Courts intentional misrepresentation of their own prior unpublished decisions is against law and a violation of petitioners right to due process and equal protection afforded under the *Fourteenth Amendment of the United States Constitution.*

2. The Courts making the terms of settlement in known opposition to petitioners authority and permitting same to be entered into Court record as authorized by petitioners renders judgment N 8598 void for an excess of jurisdiction, and holding petitioners to such judgment is against law and a violation of petitioners right to due process and equal protection afforded under the *Fourteenth Amendment of the United States Constitution.*

All parties appear in the caption of the case in the United States Supreme Court.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY and CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF CASE 3

1. Proceedings in the Courts Below . . 3

2. Presentation of Question to Courts below 13

REASONS FOR GRANTING WRIT 22

1. To Insure the Individual Valid Access to those rights provided for under the law and in accordance with our constitution . . . 22

CONCLUSION 24

APPENDICES 25

A - Denial of Petition for Hearing by the CALIFORNIA SUPREME COURT (4 Civ. No. 31142)

TABLE OF CONTENTS CONTINUED

APPENDICES CONTINUED

B - Denial of Petition for Rehearing by the CALIFORNIA COURT OF APPEAL (4 Civ. No. 31142)

C - CALIFORNIA COURT OF APPEAL decision (4 Civ. No. 31142)

D - Order Denying Motion to Set Aside Judgment N 8598 and Notice of Entry

E - Judgment N 8598

F - Decision Judicially Noticed by the CALIFORNIA COURT OF APPEAL herein (4 Civ. No. 18610)

G - Decision Judicially Noticed by the CALIFORNIA COURT OF APPEAL herein (Related case No. N 14705)

H - Decision Judicially Noticed by the CALIFORNIA COURT OF APPEAL herein (Appeal of related case No. N 14705, 4 Civ. No. 24901)

I - (Related Case) Judgment on Verdict (No. N 23298) Appeal pending thereto (4 Civ. No. D001813)

TABLE OF AUTHORITIES CITED

Page

CONSTITUTION

United States Constitution
Fourteenth Amendment . . 3,21&24

UNITED STATES CODES

Title 28 Section 453 . . . . . 2&3

Title 28 Section 1257(3) 2

CALIFORNIA STATUTES

CALIFORNIA CIVIL CODE

Sections 1550 & 1565 . . . . 2&17

CALIFORNIA CODE OF CIVIL PROCEDURE

Section 1911 . . . . . 2,9&11

CASES

Beech v State Bd. of Optometry (1971)
18 Cal.App.3d 415 10

Burgees v California Mut.
Bldg. & Loan Assn. (1930)
210 Cal. 180 . . . . 16&17

TABLE OF AUTHORITIES CITED

CASES CONTINUED

Page

County of Ventura v Tillett (1982)
133 Cal.App.3d 105, 110 . . . 16

Daugherty v Board of Trustees of South Bay Union High School Dist. (1952)
111 Cal.App.2d 519 9

De La Vigne v Department of Motor Vehicles (1969)
272 Cal.App.2d 820 15

Del Riccio v Photochart (1954)
124 Cal.App.2d 301 10

Estate of Bodger (1954)
128 Cal.App.2d 710, 714 . . . 17

Faus v Nelson (1966)
241 Cal.App.2d 320 11

Harris v Spenali Auto Sales, Inc. (1962)
202 Cal.App.2d 215 10

Hone v Climatrol Inndustries Inc. (1976)
59 Cal.App.3d 513 11

In Re Charters' Estate (1956)
293 Cal.2d 778 11

Jones v World Life Research Institute (1976)
60 Cal.App.3d 836 16

TABLE OF AUTHORITIES CITED

CASES CONTINUED

Page

Knowlton v Mackenzie (1895)
110 Cal. 183, 42 P 580 . . . 15

Los Angeles v Morgan (1951)
105 Cal.App.2d 726, 732 . . . 12

Neubrand v Superior Court (1970)
9 Cal.App.3d 311, 318 . . . 12

People v Wilson (1969)
271 Cal.App.2d 60 16

People's Ditch Co. v Fresno Canal & Irrig. Co. (1907)
152 Cal. 87 17

Rosenthal v Rosenthal (1961)
197 Cal.App.2d 289 10

Shriver v Kuchel (1952)
113 Cal.App.2d 421 17

Sullivan v Sullivan (1967)
256 Cal.App.2d 301, 304 . . . 12

Vasquez v Vasquez (1952)
109 Cal.App.2d 280 16

Wuest v Wuest (1942)
53 Cal.App.2d 339, 345 . . . 15

OPINIONS BELOW

Judgment N 8598 was entered in judgment book 1154, page 483 on October 20, 1978 and is reproduced as Appendix "E" to this petition.

On July 14, 1983, petitioners moved the Court for an order setting aside judgment N 8598 due to extrinsic circumstances rendering such judgment in valid. (Appellants Appendix Page 31)[1]

On August 5, 1983, the Court signed and entered the order denying such motion. Such Court action is reproduced as Appendix "D" to this petition.

Petitioners appeal thereto, 4 Civil No. 31142, was denied by the Court of Appeal on April 19, 1984. The Court of Appeals denial of 4 Civ. No. 31142 is reproduced as Appendix "C" to this petition. Petitioners' petition for a rehearing by the Court of Appeal was denied May 7, 1984, and is reproduced as Appendix "B" to this petition.

Petitioners' petition for hearing by the California Supreme Court was denied June 27, 1984, and is reproduced as Appendix "A" to this petition.

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[1] Appellant's Appendix in lieu of Clerk's Transcript California Rules of Court 5.1 - Appellant's Appendix referenced herein as AA

JURISDICTION

The ruling of the Supreme Court of the State of California was entered June 27, 1984. This Court has Jurisdiction under *United States Code, Title 28, Section 1257(3).*

STATUTORY and CONSTITUTIONAL PROVISIONS INVOLVED

California Civil Code Sections 1550, 1565 in relevant part provide:

> "Consent is essential to the existence of a contract, and it must be free, mutual, and communicated by each party to the other."

California Civil Code of Procedure Section 1911 in relevant part provides:

> "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto."

The *United States Code, Title 28, Section 453* in relevant part provides:

> "Each Judge of the United States shall take the following oath before performing the duties of his office: 'I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as Judge according to

> the best of my abilities and understanding, agreeably to the constitution and laws of the United States. So help me God."

Fourteenth Amendment of the Constitution of the United States, Section 1 in relevant part provides:

> "No state shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

1. PROCEEDINGS IN THE COURTS BELOW - Petitioners Thomas R. Angel and Loretta C. Angel (hereinafter Angels) brought a motion for order setting aside judgment N 8598 due to extrinsic circumstances rendering such judgment invalid.

Such motion was brought in relevant part because it is undenied anywhere of record that the Court in known opposition to Angels authority made the terms of settlement as set forth in judgment N 8598 and permitted same to be put into Court Record as authorized by Angels while Angels were not present in Court and in the presence of defendants counsel.

On August 5, 1983, the court signed and entered the order denying such motion.

The Court of Appeal affirmed the lower courts ruling herein on April 19, 1984. In such decision, the Court of Appeal states

> "On October 23, 1978, they (Angels) moved to set the judgment aside, claiming Midlam was not authorized by them to accept the note. The motion was denied November 3, 1978. They appealed and we affirmed (4 Civ. No. 18610)." (Appendix C-2/4-8)

Decision by the Court of Appeal in 4 Civ. No. 18610 is reproduced as Appendix "F" to this petition. In such decision, the Court of Appeal states

> "On October 23, 1978, through new counsel, plaintiffs (Angels) moved to set aside the judgment under Code of Civil Procedure section 473 on the grounds they had received erroneous advice from Kevin Midlam (Midlam), their lawyer at trial. They claimed Midlam had incorrectly explained to them the status of the lis pendens on the subject property pending appeal." (Appendix F-2/20-23 & F-3/1-4)

Therefore, the Court of Appeals' current statement in unpublished decision is a total misrepresentation of their own unpublished decision in 4 Civ. No. 18610.

Further, as to related case N 14705 and appeal 4 Civ. No. 24901 thereto, the Court of Appeal in current decision states

> "Renn's motion for Summary Judgment on Res Judicata grounds was granted and we affirmed

> on January 24, 1983, and imposed sanctions against Angels for filing a frivolous appeal (4 Civ. No. 24901)." (Appendix C-2/16-20)

The memorandum of decision in case N 14705 is reproduced as Appendix "G" to this petition. In such decision, the Superior Court states

> "It is important to indicate that the motions now before the court relate to general allegations of fraud or collusion between attorneys for plaintiffs (Angels) and defendants in the prior case regarding an alleged contract for the sale of real property (case numnber N 8598). The summary judgment motions in this matter, of course, relate only to this action and is not and cannot be a determination of the issues decided in the prior action." (Appendix G-2/8-16)

Therefore, the Superior Courts own decision establishes that Renns motion for Summary Judgment was neither brought on Res Judicata grounds nor determined as Res Judicata.

The Trial Court, by way of its' memorandum of decision re summary judgment in case N 14705 makes it abundantly clear that its determination of such case is not and can not be a determination of the issues decided in Case N 8598 and thereto is not and can not be res judicata.

Decision by the Court of Appeal in 4 Civ. No. 24901 is reproduced as Appendix "H" to this petition.

In such decision, the Court of Appeal states

> "The trial courts' summary judgment in the instant case is based on the failure of the Angels to state any fact in their moving papers and declarations to support their accusation the Renns offered Midlam money in order to lose the lawsuit. The trial court found and our review of the declarations and moving papers support the conclusion there was no showing Midlam's conduct was in any way connected to the Renns." (Appendix H-4/6-14) "Even assuming defendants' counsel was not entitled to rely upon Midlams stipulation entered on the record in open court, there is no inference arising from this action which would lead a rational trier of fact to conclude the defendants paid Midlam to "throw the case." Assuming Midlam exceeded his authority to enter settlement, and fraudulently defeated his clients' interests, the judgment cannot be set aside unless Midlam's conduct was in some way connected to the Renns." (Appendix H-5/2-12) "Arguments, speculation, and evidence of matters beyond the scope of the pleadings will not be considered." (Appendix H-3/22 & H-4/1-2).

Such statement of decision establishes that the authority in settlement as set forth in judgment N 8598 was not an issue considered by the Court of Appeal and thereto not determined, nor Res Judicata in related case N 14705 and appeal thereto, 4 Civ. No. 24901.

As evidenced in Angels' complaint N 14705 to set aside judgment due to extrinsic fraud, the sole issue was stated as follows:

> "Defendants herein obtained the aforementioned judgment through extrinsic fraud in that they bought plaintiffs attorney Kevin Midlam evidenced as follows:" (AA 105/3-5)

Therefore, as evidenced by Angels' complaint N 14705 and all Court opinion and determinations thereto, the single issue determined as to such case was whether or not defendants bought Angels attorneys.

During appeal 4 Civ. No. 18610, Angels made application for leave to produce additional evidence, being Midlams letter to Angels dated September 29, 1978, wherein Midlam states that he had informed both the court and the opposition that the settlement of record was not authorized by Angels and that the Court had recommended the terms of the settlement set forth in judgment N 8598. (AA 83 thru 99) Such application was denied as follows:

> "the court of appeal declined to receive evidence on appeal which was not part of the record before the trial court and which was neither authenticated nor weighed by the trier of fact." (AA 100)

Such statement of decision establishes that the issue of authority was neither considered nor determined in 4 Civ. No. 18610 and that such issue was not previously considered nor determined by the Trial Court.

Angels filed a statement of disqualification for cause of trial judge Charles W. Froehlich Jr. as to cases N 8598 and N 14705 on September 22, 1980. The facts set forth in such statement were in substance that at the time the settlement was entered into record in open Court as being authorized by Angels, both the Court and the opposition knew Angels had not authorized such settlement. (AA 168 thru 178) Judge Froehlich denied none of the actions presented in such statement of disqualification, but rather denied any prejudice against Angels in such actions. (AA 179 & 180) Angels statement of disqualification was denied. (AA 181)

Angels pursued such denial by way of a petition for Writ of Certiorari, 4 Civil 24824, wherein the Court of Appeal stated that such petition "states no grounds for legal relief and is denied."

Subsequently, Angels petitioned the United States Supreme Court by way of Writ of Certiorari, No. 81-529, wherein the Trial Courts Excess of Jurisdiction is addressed, but nowhere did Angels allege that such Excess of Jurisdiction rendered judgment N 8598 void. Angels could not allege what they did not

know. Angels have not, prior to the instant motion, etc., known such excess rendered judgment N 8598 void, and thereto have nowhere previously presented the issue of judgment N 8598 being void, and having not presented such issue, no determination thereto could have been made - - rendering Res Judicata herein totally inapplicable and improper under the law.

Invoking the doctrine of Res Judicata against Angels herein is against law as follows:

In accordance with *CCP § 1911* as interpreted in *Daugherty v Board of Trustees of South Bay Union High School Dist.*, (1952) 111 Cal.App.2d 519, "The expression that a judgment is conclusive of every matter which the parties might have litigated in the action means that a judgment is conclusive upon the issues tendered by the complaint, and matters not tendered as issues in the action are not affected by the judgment, and a judgment does not operate as an estoppel to a subsequent action between same parties as respects rights, claims, or demands arising out of same subject - matter, but which constitute separate or distinct causes of action, and which were not put

in issue in the former action."

In accordance with *Harris v Spinali Auto Sales, Inc.* (1962) 202 Cal.App.2d 215, "A judgment is not Res Judicata as to issues not disposed of and interpretation of stipulation is governed by rules applying to interpretation of contracts, and court may not add provisions of terms, or make new stipulation for parties."

In accordance with *Bleech v State Bd. of Optometry* (1971) 18 Cal.App.3d 415, "When court expressly refrains from determining an issue, the doctrine of collateral estoppel does not apply to prevent a subsecuent determination of that issue and in order to foreclose litigation of issue under doctrines of Res Judicata and Collateral Estoppel, the particular legal or factual issue must have been presented and determined in the former action."

In accordance with *Rosenthal v Rosenthal* (1961) 197 Cal.App.2d 289, "Judgment or Order never operates as Res Judicata of issue which it clearly did not determine."

In accordance with *Del Riccio v Photochart* (1954) 124 Cal.App.2d 301, "Any language of an opinion which

goes beyond the exact matter in issue counts for naught in the law of Res Judicata."

In accordance with *CCP § 1911,* as interpreted in *Faus v Nelson* (1966) 241 Cal.App.2d 320, "A judgment is not conclusive with respect to matters which the Court rendering the judgment expressly or impliedly excludes from its determination or consideration.

In accordance with *Hone v Climatrol Industries, Inc.* (1976) 59 Cal.App.3d 513, "Doctrine of Res Judicata should not be used to work injustice or to take unfair advantage."

In accordance with *In Re Charters' Estate* (1956) 293 Cal.2d 778, "Public policy underlying principle of Res Judicata that there must be an end to litigation requires that issues involved be set at rest by final judgments, but there is also a policy that a party should not be deprived of a fair adversary proceeding in which fully to present his case."

Where the Court and the Opposition had original knowledge that judgment N 8598 was void from inception for an Excess of Jurisdiction, neither the Court nor the Opposition can justify in equity the applica-

tion or assertion of the statute of limitations or laches as a penalty or defense against a litigant seeking to set aside such judgment. Such procedure is against law as follows:

In accordance with *Los Angeles v Morgan* (1951) 105 Cal.App.2d 726, 732, "Where an action has equitable relief from a void judgment as its objective, the statute of limitations and laches may not be invoked as a defense."

In accordance with *Sullivan v Sullivan* (1967) 256 Cal.App.2d 301, 304, "Court has inherent power to set aside a void judgment at any time."

In accordance with *Neubrand v Superior Court* (1970) 9 Cal.App.3d 311, 318, "Where a judgment has been obtained through extrinsic fraud or mistake, it may be set aside either by an independent action in equity or by motion by the Superior Court through the exercise of its inherent jurisdiction in equity and where judgment has been obtained through extrinsic fraud or mistake, that judgment as properly set aside, though long since final, either by independent suit in equity or, where Court rendering judgment possesses general jurisdiction in law and equity, by

means of motion addressed to that Court."

All such law and facts were presented at proceedings in all courts involved below.

2. PRESENTATION OF QUESTION TO COURTS BELOW - Angels attorney at trial, Kevin Midlam, wrote a letter to Angels dated September 29, 1978, wherein Midlam stated as follows:

> "In compliance with your agreement in our last phone conversation on September 26, I again appeared in court on September 27, 1978 and discussed the matter in the presence of Mr. Clark with the court, concerning my observations and opinions, and advised the court of our willingness to accept a settlement in the amount of $2,000.00. In connection with the payment of such, I was advised by Mr. Clark that the cash was not available, and that payment would have to be contingent upon the sale of the property which was the subject of the litigation. I advised the court that you had not authorized me to accept such an offer, but rather by way of cash."

> "After further discussion the court recomended, and Mr. Clark accepted on behalf of Mr. Renn, that the $2,000.00 be reduced to a promissory note bearing interest in the amount of 10%, secured by a deed of trust on Parcel No. 1 of Mr. Renn's property, for a term of one year, either to be paid in full plus interest at the time of sale, or payable in full plus interest at the conclusion of one year." (AA 38 thru 39)

Louis H. Renns' attorney, Mr. Clark, testified in deposition as follows:

> "My recollection would be that the court did recommend that the case be settled on the terms that were set forth in the stipulation on the record." (AA 174/5-7)

In accordance with the reporters transcript of trial on September 27, 1978, Midlam states as follows:

> "I have previously discussed with them (Angels), both face - to - face and telephonically, the proposed settlement." (AA 175/12-13)

Such evidence was presented in Angels Statement of disqualification for cause of trial Judge Charles W. Froehlich Jr. (AA 168 thru 178)

Judge Froehlich answered Angels statement of disqualification by declaration as follows:

> "I unequivocally deny that on the basis of such factual material, whether or not true, or on any other basis known to me, I am prejudiced against the Angels or their counsel or their cause, and further state that there is no basis for my disqualification to hear post - trial motions in the said matter." (AA 179/20-25)

Therefore, it is undenied anywhere of Record and established by documented evidence and Court Record that the Court in known opposition to Angels authorization made the terms of settlement as set forth in judgment N 8598 and permitted same to be put into

Court Record as authorized by Angels while Angels were not present in Court and in the presence of defendants counsel.

That judgment N 8598 is void from incepotion for an Excess of the Courts Jurisdiction is established in law as follows:

In accordance with *Knowlton v Mackenzie* (1895) 110 Cal. 183, 42 P 580 it is stated, "When party and Court are aware that attorney for opposing party entered into stipulation in direct opposition to clients' wishes, Court should not act thereon, nor can party enforce judgment rendered by reason thereof."

In accordance with *Wuest v Wuest* (1942) 53 Cal.App.2d 339, 345, "Action or motion in equity to vacate a judgment as properly instituted on the grounds that the judgment is void due to the coercive manner in which the trial judge insisted that the aggrieved party sign a stipulation to dispose of community property."

In accordance with *De la Vigne v Department of Motor Vehicles* (1969) 272 Cal.App.2d 820, "A void judgment is one of no validity or effect, unenforce-

able and of no legal force."

In accordance with *People v Wilson* (1969) 271 Cal.App.2d 60 and *Vasquez v Vasquez* (1952) 109 Cal.App.2d 280, "In rendering judgment, Court must remain within its jurisdiction and power, and where it grants relief which it has no power to grant, judgment is void."

In accordance with *Jones v World Life Research Institute* (1976) 60 Cal.App.3d 836, "a judgment is made void for an excess of jurisdiction and "Trial court is under duty to render a judgment that is in exact conformity with an agreement or stipulation of parties" and "interpretation of contracts and Courts may not add to the provision thereof insert a term not found therein or make a new stipulation for parties."

In accordance with *County of Ventura v Tillett* (1982) 133 Cal.App.3d 105, 110, "Judgment is void on its face if Court which rendered judgment lacked personal or subject matter jurisdiction or Exceeded its Jurisdiction in granting relief which Court had no power to grant."

In accordance with *Burgess v California Mut.Bldg.*

& Loan Assn. (1930) 210 Cal. 180, "The Court can not make contract of compromise and satisfaction for parties."

In accordance with *People's Ditch Co. v Fresno Canal & Irrig. Co.,* (1907) 152 Cal. 87, "It is the duty of the Court to enter judgment in accordance with the stipulation of the parties, but this is the limit of its power in the matter. If the agreement is not full enough to dispose of all the claims or rights in the subject matter, the Court has no power to supplement or construe it by the insertion of extraneous matter in the decree. A failure of the stipulation fully to express the intention of the parties must be corrected by appropriate action."

In accordance with *Shriver v Kuchel* (1952) 113 Cal.App.2d 421, "Compromise agreements are governed by the legal principles applicable to contracts generally."

In accordance with *Civil Code Sections 1550, 1565,* "Consent is essential to the existence of a contract, and it must be free, mutual, and communicated by each party to the other."

In accordance with *Estate of Bodger* (1954) 128

Cal.App.2d 710, 714, "It is a violation of due process when the Court infringes upon petitioners' freedom of contract which is an Excess of the Court's Jurisdiction."

Additionally, it is uncontradicted anywhere of Record that Angels never consented to nor accepted the settlement as set forth in judgment N 8598. (AA 33/27-28 & 34/8)

It is uncontradicted and established by testimony of Louis H. Renn, himself, that his claim of reliance upon the settlement as set forth in Judgment N 8598 was a fraudulent claim. (AA 107/2-8, 109/6-8 & 110 thru 118)

It is uncontradicted and established by documented evidence that Louis H. Renn rescinded the settlement as set forth in judgment N 8598 by withdrawing the 3rd deed of trust from county records on July 1, 1980 in direct violation of such judgment. (AA 123 thru 126)

Further, the subject unimproved property herein was not transferred to bona fide purchasers inasmuch as a Lis Pendens was filed on such property on June 7, 1977 (AA 119 & 120), and was effective on December

3rd, 1978 (AA 110 thru 117), the date on which the sale of the subject property took place between Renns and Nowlings.

It is uncontradicted that Angels lawsuit N 8598 for Specific performance of a contract to transfer real property is meritorious. In fact substantial evidence exists that Angels lawsuit herein was a winning lawsuit under the law requiring the application of no court discretion, being the expert opinion of attorney Lynne M. Geyser, wherein she states as follows:

> "As you requested, I have reviewed the reporter's transcript of trial in Angel v Renn, along with the plaintiff's trial brief, exhibits submitted to the court ...
>
> A review of the exhibits shows that there was a contract sufficient to meet the requirements of the statute of frauds with respect to the sale of land. Nothing at trial denigrates from that conclusion, yet the trial judge reached a different conclusion. Why?" (AA 136/1-9 of 127 thru 139)
>
> "3. On page 92, in discussing the reliance issue, the court asks whether by April, you knew that the Renn's would not go through with the transaction. Midlam says yes - - this directly contradicts the earlier evidence on direct testimony and would also undermine the validity of the whole transaction since the signed memorandum on which everything rests was not signed until the end of May. It would made no sense to claim that you knew Renn

> would not go through with the transaction one month before the time that he actually signed a memorandum with respect thereto and which contained, as the only reason for which he would not complete the transaction, the phrase "circumstances beyond my control." (AA 139)

Declarations of attorneys Peter J. Mueller, Scott Kaisler, Roger Woolley and William E. Chisham establish a belief by four attorneys that Angels lawsuit herein is meritorious. (AA 140 thru 144)

Lastly, prior to trial herein, Renn moved the Court for an Order Expunging the Lis Pendens. The Honorable Michael I. Greer, Judge of Superior Court, denied such motion and further stated in open Court at such hearing that he believed that Angels would prevail at trial. (AA 121 & 122)

Angels right to contract was eliminated by Judge Froehlich when he, in known opposition to Angels specific authorization, made the terms of settlement set forth in judgment N 8598. Judge Froehlich's permitting Angels knowledge of such terms to be misrepresented for Court Record is fraudulent if done by anyone, but for a judge to admit to the capability of doing such in declaration, under penalty of perjury, amounts to a total disregard for his oath of

office in accordance with the *United States Code, Title 28, Section 453.* Whether or not judge Froehlich would permit intentional misrepresentation of facts into Court Record against Angels can not be circumvented by a lack of recall, but rather is a matter of integrity essential to the office of judge and must be specifically denied in order to retain public trust.

Judgment N 8598 is void for an Excess of the Courts' Jurisdiction and to hold Angels to such void judgment is a violation of their fundamental right to contract and thereto is a violation of Angels right to due process and equal protection under the law in accordance with the *Fourteenth Amendment of the United States Constitution.*

The question as herein represented was presented to the Courts below.

Pursuant to all litigation involved in Angels attempted setting aside of judgment N 8598, Renn filed a lawsuit against Angels for malicious prosecution and intentional infliction of emotional distress (related case No. N 23298), wherein judgment on verdict was rendered against Angels and damages

awarded to Renn in the amount of $154,331.13. (Appendix I) Appeal thereto is pending as 4 Civ. No. D001813.

In related case No. N 23298, the Courts attack on Angels was cruel and unrestrained and massive and for that reason, Angels make special request that the United States Supreme Court consider the final outcome of appeal thereto, being 4 Civ. No. D001813, before rendering final decision herein.

REASON FOR GRANTING WRIT

1. TO INSURE THE INDIVIDUAL VALID ACCESS TO THOSE RIGHTS PROVIDED FOR UNDER THE LAW AND IN ACCORDANCE WITH OUR CONSTITUTION

To deny the rights of one individual is a dangerous precendent and a contradiction to the fundamental concept upon which justice in this country was originally founded. Justice denied anywhere is a threat to justice everywhere.

The Courts below consistently minimize the difference in settlement of cash as opposed to a promissory note. The difference is that of individual right, the difference between choice and no choice, the difference between justice and injustice. Justice can not and should not be minimized.

The difference is not insignificant. The difference is the individuals right to a belief in our judicial system, and that belief can not and should not be minimized.

The difference is not so small, not at all.

Is it unreasonable to pursue a belief in the judicial system of this country, a belief held for a life time. It is afterall a belief that has made this country great. It is a belief upon which this country was founded and we believe it is a belief worth pursuing.

No Court decision can be valid wherein the basis for such decision is rooted in an intentional misrepresentation and distortion of such Courts own prior decisions.

Such fraud is accomplished under the shield of unpublished decision which further perpetrates injustice upon any individual litigant who relies upon published law as the true and current state of the law.

Decision herein affects no less and no more than every individual seeking justice in the judicial system of this country.

CONCLUSION

This petition should be granted because the Supreme Court of the State of California has ruled in such a way as to deprive Angels due process of law and equal protection under the law provided for in the *Fourteenth Amendment of the United States Constitution*. Of great importance is the fact that the States Court Decision if allowed to stand defeats public trust.

Petitioners, Thomas R. Angel and Loretta C. Angel, pray that a Writ of Certiorari issue to review the decree of the Court of Appeal and the Supreme Court of the State of California's denial of the petition for hearing thereto, or that, in the alternative, this petition be held for consideration until petitioners related pending appeal, 4 Civ. No. D001813, is finally determined.

Respectfully submitted,

DATED: August 10, 1984

Thomas R. Angel and
Loretta C. Angel

Petitioners pro se

APPENDIX SECTION

A - Denial of Petition for Hearing by the CALIFORNIA SUPREME COURT (4 Civ. No. 31142)

B - Denial of Petition for Rehearing by the CALIFORNIA COURT OF APPEAL (4 Civ. No. 31142)

C - CALIFORNIA COURT OF APPEAL decision (4 Civ. No. 31142)

D - Order Denying Motion to Set Aside Judgment N 8598 and Notice of Entry

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G - Decision Judicially Noticed by the CALIFORNIA COURT OF APPEAL herein (Related case No. N 14705)

H - Decision Judicially Noticed by the CALIFORNIA COURT OF APPEAL herein (Appeal of related case No. N 14705, 4 Civ. No. 24901)

I - (Related Case)
Judgment on Verdict (No. N 23298)
Appeal pending thereto (4 Civ. No. D 001813)

CLERK'S OFFICE, SUPREME COURT
4250 State Building

San Francisco, California 94102

Jun 27 1984

I have this day filed Order

HEARING DENIED

In re: 4 Civ. *No.* 31142

THOMAS R. ANGEL & LORETTA C. ANGEL

vs.

LOUIS H. RENN

Respectfully,

Clerk

COURT OF APPEAL -- STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

Court of Appeal
Fourth District

F I L E D

May 7, 1984

KEENAN G. CASADY, Clerk

Signed by: Kelly

Deputy Clerk

THOMAS R. ANGEL, ET AL.,
Plaintiffs-Petitioners,

vs.

LOUIS H. RENN,
Defendant-Respondent.

D 000965

4 Civil No. 31142

Superior Court No. N 8598

THE COURT:

The Petition for rehearing is denied.

Signed by: Cologne

Acting Presiding Justice

Copies to: Mr. & Mrs. Thomas Angel
Mr. Philip Burkhardt
Superior Court, SD

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

FILED

Keenan G. Cassady, Clerk

APR 19 1984

Court of Appeal
Fourth District

THOMAS R. ANGEL, ET AL., Plaintiffs and Appellants, v. LOUIS H. RENN, Defendant and Respondent.	Case NO. D000965 4 Civ. No. 31142 (Super. Ct. No. N 8598)

Appeal from a judgment of the Superior Court of San Diego County, Anthony C. Joseph, Judge. Affirmed.

Thomas R. and Loretta C. Angel are before us for the third time (4 Civ. No. 18610, 4 Civ. No. 24901) concerning orders of the superior court denying them relief from a stipulated judgment entered October 20, 1978, in case No. N 8598 terminating their lawsuit against Louis H. Renn for specific performance of a real estate sale.

I

Kevin Midlam, attorney for the Angels, accepted on their behalf a settlement of the lawsuit calling

for a $2,000 promissory note in their favor from Renn instead of $2,000 cash. | Judgment was entered on the settlement on October 20, 1978, and the Angels waived appeal rights. On October 23, 1978, they moved to set the judgment aside, claiming Midlam was not authorized by them to accept the note. The motion was denied November 3, 1978. They appealed and we affirmed (4 Civ. No. 18610). We denied two petitions for rehearing and our Supreme Court denied their petition for a hearing. Several writs followed, including a petition for certiorari to the United States Supreme Court denied November 16, 1981.

II

The Angels then filed another lawsuit (Super. Ct. Case No. N 14705) to set aside the first judgment for extrinsic fraud, on the same basis as urged by them in their earlier motion. Renn's motion for summary judgment on res judicata grounds was granted and we affirmed on January 24, 1983, and imposed sanctions against the Angels for filing a frivolous appeal (4 Civ. No. 24901).

III

On June 21, 1983, the Angels again notice a

motion for an order setting aside the first judgment for extrinsic fraud. The order denying that motion is the subject of this third appeal. The grounds urged in this motion are identical to those argued in their first such motion filed on October 23, 1978, denied on November 3, 1978, and affirmed by us. The June 21, 1983, motion now before us on appeal likewise tracks | the pleadings in the second lawsuit 3
filed by the Angels seeking to set aside the first judgment. We affirmed the grant of summary judgment in that lawsuit.

We take judicial notice of the two earlier proceedings. This third appeal makes the same contentions twice rejected by us. Renn asks for $5,000 sanctions. As we said the second time around in 4 Civ. No. 24901:

> "The Renns pose this is a proper case for the imposition of sanctions. They argue this appeal coupled with the Angels' litigious history of filings directed to the same legal points is simply harassment.
>
> "Loretta Angel declared 'I gave my word to [my son] that I would not give up and I will not, God as my witness, I will not.' And she has not. The issue on this appeal was presented and argued to this court in each of two petitions for

rehearing in 4 Civ. 18610. Although the trial court repeatedly questioned the Angels to discover whether there was a single fact or scrap of evidence to support their theory, not a scintilla appeared which has not appeared in the record from the beginning.

"The Renns rely on Beckstead v. International Industries, Inc., 127 Cal.App.3d 927. In Beckstead this court held sanctions were proper when the plaintiffs continued to relitigate unsuccessful legal positions because it found the appeal was 'motivated solely to harass and annoy.' (Id., at p. 930.) The Supreme Court in In re Marraiage of Flaherty, 31 Cal.3d 637, 650, described a two-pronged definition to determine when an appeal is frivolous in order to impose sanctions on the appealing party. The first prong, as in Beckstead, is when an appeal is taken for an improper motive representing a time consuming and disruptive use of the judicial process. 4 Secondly, an appeal is frivolous 'when it indisputably has no merit -- when any reasonable attorney would agree that the appeal is totally and completely without merit. [Citation.]' (Flaherty, at p. 650.)

"This appeal has been time consuming and disruptive and any reasonable attorney would acknowledge that it is completely without merit. On June 11, 1981 (4 Civ. No. 24824) this court denied the Angels' writ of certiorari and advised them of the court's 'power to impose sanctions for successive, frivolous petitions directed to the same legal points.' Does the fact the Angels appear in pro per cause a different result? To decline to impose sanctions in this circumstance is to give a pro per on specific notice of

> the consequences of a frivolous meritless appeal, an undue advantage over a lawyer represented litigant. The Angels abuse the appellate process and we therefore impose a sanction of $500."

We adopt that reasoning and those conclusions. Enough is enough. This appeal is frivolous.

Judgment affirmed. Angels to pay $1,000 forthwith to Renn.

Signed by: Butler

BUTLER, J.

WE CONCUR:

Signed by: Cologne

COLOGNE, Acting P. J.

Signed by: Wiener

WIENER, J.

CLARK & BURKHARDT
Attorneys at Law
A Partnership of Professional Corporations
El Tordo & Linea Del Cielo
Post Office Box 1369
Rancho Santa Fe, California 92067
(714) 756-3743

Attorneys for Defendants

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO, NORTH COUNTY BRANCH

THOMAS R. ANGEL and LORETTA C. ANGEL, Plaintiffs, v. LOUIS H. RENN, et. al., Defendants.	CASE NO. N 8598 NOTICE OF ENTRY OF ORDER

To the above named Plaintiffs,in propria persona:

Notice is hereby given that on August 5, 1983, the above entitled court duly entered an Order denying the Motion of Plaintiff's for an Order to Set Aside the Judgment herein and granted Defendant's Application for Sanctions and Attorney's Fees in the sum of $873 payable within sixty days of July 22, 1983.

DATED: August 16, 1983

CLARK & BURKHARDT

By Philip Burkhardt
Attorney for Defendants

CLARK & BURKHARDT
Attorneys at Law
A Partnership of Professional Corporations
El Tordo & Linea Del Cielo
Post Office Box 1369
Rancho Santa Fe, California 92067
(714) 756-3743

Attorneys for Defendants

F I L E D
Robert D. Zumwalt, Clerk
AUG 5 - 1983
BY M. HOLBROOK

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO, NORTH COUNTY BRANCH

THOMAS R. ANGEL and LORETTA C. ANGEL, Plaintiffs, v. LOUIS H. RENN, et. al., Defendants.	CASE NO. N 8598 ORDER DENYING MOTION TO SET ASIDE JUDGMENT AND IMPOSING SANCTIONS

The Motion of Plaintiff's for an Order to Set Aside the Judgment herein came on regularly for hearing by the court on July 22, 1983. Plaintiff's appeared in propria persona; Defendant appeared by counsel Clark & Burkhardt by Philip Burkhardt.

On Proof made to the satisfaction of the court that the Motion ought to be denied,

IT IS ORDERED that the Motion be, and hereby is, denied.

The court having considered the Declarations and other documents in support of and in opposition to the Motion to Reconsider, having heard the arguments
2 of the parties and ⊥ counsel, and being fully advised in the matter, the court finds as follows:

1. Defendant timely requested sanctions pursuant to C.C.P. Section 128.5;

2. Plaintiffs have previously evidenced a desire to continue the litigation between the parties regardless of the merits thereof;

3. Plaintiffs have a history of filing successive petitions, motions and applications directed to the same legal points;

4. Further proceedings brought by Plaintiffs in this matter have been time consuming and disruptive to the court's calendar;

5. A reasonable attorney would acknowledge that Plaintiff's Motion to Set Aside the Judgment is completely without merit;

6. Plaintiffs have previously been forewarned by the Appellate Court regarding the power of the courts

to impose sanctions and have been previously sanctioned in connection with an Application to Set Aside the Judgment herein in Case No. N 14705.

7. Defendant has incurred attorney's fees in the defense of this motion of at least $373; and

8. It is therefore further ordered that Defendant's Application for Sanctions be, and hereby is, granted and that Plaintiff's, and each of them, are ordered to pay to Defendant, LOUIS H. RENN, through his attorneys of record, Clark & Burkhardt, the sum of $500 in sanctions and $373 in attorney's fees, for a total of $873 within sixty days of July 22, 1983.

DATED: AUG 5 - 1983

ANTHONY C. JOSEPH

Anthony C. Joseph,
Judge of the Superior
Court

RUSSELL J. CLARK
Attorney at Law
Home Federal Building
Suite 200
221 West "E" Street
Encinitas, CA 92024
(714) 753-3553

Attorney for Defendants

F I L E D

NORTH COUNTY BRANCH

OCT 19 1978

Robert D. Zumwalt
CLERK

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO, NORTH COUNTY JUDICIAL DISTRICT

THOMAS R. ANGEL and LORETTA C. ANGEL, Plaintiffs, v. LOUIS H. RENN, MILDRED M. RENN, and DOES I through V, inclusive, Defendants.	CASE NO. N 8598 JUDGMENT CCP §631.8 E N T E R E D OCT 20 1978 Judgment Book 1184 Pg.489

The above-entitled action having come on regularly for trial on September 26, 1978, before the Honorable Charles W. Froehlich, Judge, Department C of the Superior Court in the State of California for the County of San Diego, North County Branch, plaintiffs appearing by their attorney, Russell J. Clark, a jury having been duly waived and evidence, both oral and documentary, having been introduced; plain-

tiff having rested his case, defendant having moved the Court for a judgment pursuant to Section 631.8 of the Code of Civil Procedure, and the Court being fully advised and the matter having been submitted,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the motion for judgment of nonsuit in favor of defendants Louis H. Renn and Mildred M. Renn be and the same as hereby granted in favor of said defendants on the first and second causes of action only.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED pursuant to stipulation of the parties hereto entered in open court that the third, fourth, and fifth causes of action be dismissed, that in consideration for such dismissal and plaintiffs' waiver of findings of fact and conclusions of law and their right to appeal this judgment on the first and second causes of action, defendants agree to pay plaintiffs the sum of $2,000 forthwith in the form of a note secured by third deed of trust on the property which is the subject of this litigation. Said note to bear interest at the rate of ten percent (10%) per annum all due and payable within one year of the date hereof or upon sale of the subject property,

whichever occurs first. Said trust deed to be of the standard form as utilized by commercial lending institutions in the County of San Diego. Said payment is as a matter of compromise only between the parties and shall not be construed as an admission of any wrongdoing by the defendants. It is further agreed that each party shall bear their own cost of suit incurred herein.

DATED: OCT 19 1978

Signed by: C.W.F.

Charles W. Froehlich
Judge of Superior Court

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

F I L E D
FEB 20, 1980
Robert L. Ford, Clerk
Signed by: Delton
Deputy Clerk

THOMAS R. ANGEL, et al., Plaintiffs and Appellants, v. LOUIS H. RENN, et al., Defendants and Respondents.	4 Civ. No. 18610 (Super. Ct. No. N 8598)

APPEAL from an order of the Superior Court of San Diego County, Charles W. Froehlich, Jr., Judge. Affirmed.

Plaintiffs appeal the denial of their motion to set aside a stipulated judgment. We conclude the court's ruling was within its discretion and accordingly affirm the order. We dismiss the appeal.

Factual and Procedural Background

Plaintiffs Thomas R. and Loretta C. Angel, as purchasers, sued Louis H. and Mildred M. Renn for specific performance of an agreement to sell real property (first cause of action) and for damages

based on breach of written contract, fraud, negligent misrepresentation and false promise (second through
2 fifth causes ⊥ of action). At trial after plaintiffs presented their case-in-chief, the judge said he intended to grant defendants' motion for judgment (Code Civ. Proc., §631.8) on the first and second causes of action. The judge commented that further settlement negotiations might be fruitful in light of his intended ruling. On the following day, September 27, 1978, counsel returned to court. They stated the case had been settled and recited the stipulation which the court approved. The settlement called for a $2,000 promissory note with interest at ten percent per annum from defendants to plaintiffs all due and payable upon sale of the subject property, or in one year, whichever occurred first. Plaintiffs expressly waived their right to appeal. A judgment containing the ruling pursuant to Code of Civil Procedure section 631.8 and the terms of the stipulation was signed on October 19, 1978. On October 23, 1978, through new counsel, plaintiffs moved to set aside the judgment under Code of Civil Procedure section 473 on the grounds they had received

erroneous advice from Kevin Midlam (Midlam), their lawyer at trial. They claimed Midlam had incorrectly explained to them the status of the lis pendens on the subject property pending appeal. They moved to set aside the stipulation and judgment "only insofar as the same constitute a waiver of plaintiffs' right to appeal the judgment of nonsuit as to plaintiffs' cause of action for specific performance." Points and authorities and declarations both in support and in opposition to the motion were filed. The motion was denied on November 3, 1978. 3

Plaintiffs Have the Right to Appeal the Denial of Their Motion

Before we reach the merits of their case, we resolve the threshold inquiry of plaintiffs' right to this appeal. Defendants' argument is similar to the perennial riddle, "What comes first -- the chicken or the egg?" They claim that because the judgment provides that plaintiffs have waived their right to appeal, we, without more, must dismiss. Apparently defendants concede plaintiffs have a right to trial court review under Code of Civil Procedure section 473, but not appellate review of that ruling. Courts

do not function in such a doctrinaire fashion to peremptorily dismiss cases without the exercise of thoughtful judgment. Litigants may not be deprived of meaningful appellate review without a consideration both at the trial and appellate levels of the basis for their waiver. Only if the waiver of their right to appeal was lawful may this appeal be dismissed. We must scrutinize the same issues which were presented to the court below.

The order denying plaintiffs' motion to set aside the judgment is appealable as any other order after judgment pursuant to Code of Civil Procedure section 904.1, subdivision (b). The effect of the ruling is similar to an appealable order effecting enforcement of a judgment. (See 6 Witkin, Cal. Procedure (2d ed.) Appeal, §82, p. 4093.) The ruling in this case is not comparable to an order denying a motion to vacate a judgment which is nonappealable (id., at p. 4098). The reason the latter ruling is nonappealable is that the correctness of the judgment itself can be
4 examined on ⊥ appeal and to give an aggrieved party two appeals is inconsistent with the one final judgment rule and judicial economy. Here, if we were

not to examine the issue plaintiffs raise -- their right to appeal -- they would be permanently foreclosed from ever having the opportunity for judicial review of this question.

Discretion of the Court Was Properly Exercised in Denying the Motion

> "[T]he setting aside of a particular judgment under section 473 rests largely in the discretion of the trial court and its decision will not be disturbed on appeal unless an abuse of discretion clearly appears . . . . Moreover, where the proof adduced in support of the motion (either by affidavit or by oral testimony) is controverted by the opposing party, it is within the exclusive realm of the trial court to determine the credibility of the affiants or witnesses and the weight of their testimony, and this determination is rarely disturbed on appeal. [Citations.]" (Troxell v. Troxell (1965) 237 Cal.App.2d 147, 152.)

The events which occurred at trial were not unusual. All trial judges sensitive to the need for amicable resolution of cases at all stages of the proceedings frequently suggest settlement as a meaningful alternative to the expense and delay of continued trial. Lawyers, as the agents of their clients, routinely negotiate settlements and when agreement is reached, the stipulation is handled in

an informal fashion. Courts and counsel rely upon the integrity of the bar and their mutual recognition that lawyers are officers of the court. Trial judges assume without question that lawyers, as agents for their clients, are acting either within their actual (express or implied) authority. (See, e.g., Yanchor v. Kagan (1971) 22 Cal.App.3d 544, 549.)

The primary thrust of plaintiffs' motion is not directed to Midlam's actual authority, but whether the authority he had was obtained through his erroneous legal advice.[1/]

Mrs. Angel's declaration states: ". . . I had two telephone conversations with Mr. Midlam. In the first conversation I asked him if we could appeal the court's ruling on specific performance. Mr. Midlam answered that we could appeal, but that it would be expensive and would take at least two years to be resolved. I then asked Mr. Midlam whether the lis pendens which had been previously recorded, which I

FOOTNOTE 1: Plaintiffs' points and authorities and their oral argument to the trial court centered around Midlam's advice. Mrs. Angel's declaration, however, states that Midlam had actual authority to settle for cash ($2,000) only. Whether the court resolved this issue on either the facts or the law, its ruling was well within its discretion.

knew to be our only effective way to tie up the property pending a final determination of our rights to buy it, would remain in effect during that appeal. Mr. Midlam responded that it would not." She added that because there was "no way to tie up the property during the appeal" she and her husband agreed to settle the case. After her conversations with Midlam, she then conferred with another lawyer who advised to the contrary. The lis pendens would remain in effect pending the appeal. She states that if she had known that to be the law, she and her husband would not have agreed to settle the case.

Midlam was deposed before the hearing on the motion. Portions of his testimony before the court at the hearing consisted of the following: In response to the question of whether he was asked by Mrs. Angel about the lis pendens, he said the subject had come up. He advised her that <u>in his opinion</u>, the lis pendens would not remain pending appeal. From "the facts as elicited during the time of trial and the ruling that the court made [it] appeared to me to be sound, and that in light of that I felt -- my opinion was that the lis pendens would

not stay on." He denied stating to Mrs. Angel that the lis pendens would automatically dissolve. He affirmed his statement that "in my opinion it would not stay in effect, and that is the best I can recall, the words that I used."

Although not determinative, the correctness of Midlam's advice was certainly an element for the court to consider in exercising its discretion under Code of Civil Procedure section 473. Code of Civil Procedure section 409.1 provides the motion procedure whereby a property owner can move for an order expunging the notice of lis pendens upon an appropriate showing. The burden of proof as to the Propriety of the lis pendens rests with the person(s) recording the notice who must show by a preponderance of the evidence the action does affect title or right of possession to real property and it is being pursued for a proper purpose and in good faith. (See Review of Selective 1976 California Legislation (1977) 8 Pacific L.J. 165, 453.) Careful lawyers recognizing the vagaries of trial and the uncertainties associated with law and motion practice generally express themselves to their clients in terms of

their opinion as to what the possible outcome will be based on their judgment, knowledge and experience. Midlam's advice, in the context it was furnished, 7 was most reasonable. He opined the lis pendens would not remain. He had just finished presenting his clients' case. The trial judge had granted a Code of Civil Procedure section 631.8 motion and the damage causes of action were awaiting further trial. The odds at that juncture certainly favored an expungement of the lis pendens pending appeal rather than its remaining. When we examine precedent on this question (see, e.g., Nash v. Superior Court (1978) 86 Cal.App.3d 690), his advice was sound. The fact that reasonable and capable lawyers might differ on this issue does not mean that Midlam's advice was erroneous. (Cf. diss. opn. of Jefferson, J. with the majority in Nash v. Superior Court, supra.)

Even if we were to assume, however, that Midlam did not sufficiently qualify his advice to plainitffs to assure their full understanding of the issue, we would nevertheless conclude the court acted within its discretion.

One constant theme is present in Code of Civil

Procedure section 473 motions -- parties should not be denied their right to a trial on the merits. Here, plaintiffs had their trial. The denial of their motion did not deprive them of their day in court. Settlement in the professional and experienced eye of the judge -- the trier of fact -- was appropriate. There is no better person capable of determining the advantages of settlement compared to the risks of continued trial than the judge presiding over the proceedings.

Another legitimate concern expressed by the court was the need for finality in dispute resolutions. Rarely do settlements satisfy both parties. The court quite properly wished to establish an image
8 that parties, once having made a deal, should recognize its conclusiveness. The integrity of the judicial process and the reliance of those acting upon settlements, require firmness by courts when faced with the not infrequent remorse which follows settlement.

The court might well have interpreted plaintiffs' motion and declaration as indicating their wish to accept only the benefits of the settlement, but not

the obligations. The limitation of their motion directed to the adverse ruling on the first and second causes of action but ignoring the remaining causes of action, reflects an intention to retain the $2,000 note while pursuing their right to specific performance. Although that issue has now been clarified for plaintiffs have since tendered the note to defendants, that issue was not so clearly presented to the court below. That court may well have considered the apparent inequity as an additional basis for its ruling.

For all of these reasons, we hold the court did not abuse its discretion in denying plaintiffs' motion to set aside the judgment. The provisions of the judgment, including plaintiffs' waiver of the right to appeal, are valid, binding and enforceable.

Disposition

Plaintiffs' appeal is dismissed. The lis pendens on the subject real property is expunged.

Signed by: Wiener
J.

WE CONCUR:

Signed by: Staniforth
Acting P.J.

Signed by: Henderson
J.*

*Judge of the Superior Court of San Diego County sitting under assignment by the Chairperson of the Judicial Council.

F I L E D

MAR 24 1981

BY J. RYDER

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

THOMAS R. ANGEL and LORETTA C. ANGEL, Plaintiffs, vs. LOUIS H. RENN, MIDDRED M. RENN, et al., Defendants.	No. N 14705 MEMORANDUM OF DECISION RE MOTIONS FOR SUMMARY JUDGMENT

Before the Court in this matter is a "Notice Of Motion For Summary Judgment For Defendants Or For An Order Requiring Plaintiffs To Furnish Security" filed on October 16, 1980. Cross-motions are contained in the plaintiffs' "Points And Authorities In Opposition To Motions For Summary Judgment and Security" filed October 22, 1980, and in a "Notice Of Motion And Motion For Partial Summary Judgment On Issue Of

Meritorious Case In Case Number 8598" filed on January 19, 1981. The Court's file in this matter has now grown to three very substantial volumes. The Court heard argument on January 30, 1981. The Court has reviewed the Motions, the pleadings, the briefing, the declarations, and exhibits attached thereto in the file.

It is important to indicate that the motions now 2
before the Court relate to general allegations of fraud or collusion between attorneys for plaintiffs and defendants in the prior case regarding an alleged contract for the sale of real property (case number N 8598). The summary judgment motions in this matter, of course, relate only to this action and is not and cannot be a determination of the issues decided in the prior action.

Plaintiffs have attempted to set aside the entry of a judgment arrived at by means of settlement in N 8598 before both the trial and Appellate Court. Those motions were refused. Attached to the "Declaration of Russell J. Clark in Support of Motion for Security" filed herein on May 12, 1980 is the transcript of the Trial Court's hearing regarding the

motion to set aside the Trial Court's judgment. (See Exhibit D to such motion.) What was stated by the Trial Court Judge at that time bears repeating herein. The following quoted material is set forth in order to clearly set the framework in which the motions for summary judgment in this second action must be considered. The Trial Court there said:

> ". . . if all this were, were a motion to set aside a waiver of Findings of Fact and Conclusions of Law, and to set aside a stipulation waiving appeal, I would have no hesitancy in doing that.
>
> But it isn't that. It's a motion to set aside a settlement. That is basically what it is. And I have got to approach that kind of motion with a great
> 3 deal more hesitancy, because we have [1] settlements every day around this courthouse, we have twenty times as many settlements as we do trials.
>
> And many, many times, after people settle lawsuits they are unhappy about it. And sometimes it's a matter of changing their minds.
>
> Other times, it's a matter of going and talking to somebody else, and concluding in their own mind that the advice they got at the time of the settlement was not the best advice they could have gotten.
>
> This Court, as well as most other Courts, is very, very reluctant to let people come in and set aside their settlements, except for extrinsic fraud which means intentional misrepresenta-

> tion, holding back of facts; not innocent bad legal advive, or legal advice which was misconstrued.
>
> I cant't let you set aside that agreement. And I am very sorry about that, because I know how important it is to the Angels. I am sure it is important to the defendants, too, but I just can't do that, Mr. Dodge. [Plaintiffs' counsel.]
>
> I appreciate your bringing the motion for these people. I suspect that I am doing them a great favor not to let them proceed with the lawsuit. I am reasonably satisfied they would spend an awful lot of money to no good effect.
>
> That is not the reason for denying the motion, I I am sure you understand that." 4

It also is important to point out at this time that the action presently before the Court is an action by the Angels against the Renns, the defendants in the first lawsuit. After reviewing the substantial material filed by the Angels herein, This Court concludes the Angels now reason that the only way that the original case could have been settled was by way of a fraudulent agreement between counsel for themselves and the defendants therein.

After reading the declarations of the persons involved, including Mr. Midlam, Mr. and Mrs. Angel, and Mr. Clark, and a reading of the correspondence

which is attached to numerous Memorandum of Points and Authorities, this Court believes that misunderstandings arose between the Angels and their attorney. The Angels, after authorizing settlement, now dissect their several conversations with their attorney on the night before the settlement. The Angels now question their attorney's advice regarding expungement of lis pendens after the granting of a motion of nonsuit, and the acceptance of a note secured by a trust deed to secure the settlement amount - which amount plaintiffs indicated to their counsel would be acceptable to them.

The plaintiffs' motions for summary judgment must be denied. There are clearly issues of fact regarding conversations between the Angels and Mr. Midlam, regarding any agreement between counsel whatsoever, and regarding any concerted action by attorneys Midlam and Clark.

The motion for summary judgment by defendants must be granted. Under Code of Civil Procedure
5 section 437, it is necessary | to set forth facts which justify the continuance of a lawsuit in the face of a request for summary judgment. The sole

basis of the plaintiffs' action is inference and supposition. It is easy to understand that Angels (who in spite of their prodigious filings in this case - are not attorneys) may feel that the inferences suggested by them are so strong that they constitute fact. There is in reality, however, no factual basis on which to sustain their contention that counsel for plaintiffs and defendants in N 8598 conspired to bring about a judgment against the Angels. To the contrary are the declarations of Mr. Midlam and the defendants which are supported by exhibits attached to the briefing in the file. The plaintiffs' substantial burden in this matter is to prove extrinsic fraud and the Court has found no such proof contained in any of the documentation filed by or on behalf of the Angels.

Finally, this Court cannot help but feel that this action is in reality an attempt to redetermine the conclusion of Judge Froehlich on the motion for nonsuit in the prior case. Included within the file are several declarations of counsel who previously represented the Angels, expressing their view that N 8598 was a meritorious case. As stated previously,

that is not the issue before the Court. The issue presented in this case is the alleged fraud between cousel for plaintiffs and defendants in the initial action. In that regard the summary judgment motion of defendants is well taken and is therefore granted.

The granting of this motion and the denial of the plaintiffs' summary judgment motion precludes the need to decide any other ⊥ motions presently before this Court.

DATED: March 24, 1981

Signed by Anthony C. Joseph

JUDGE OF THE SUPERIOR COURT

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

FILED

JAN 24 1983

KEENAN G. CASADY, Clerk

Signed by: Ondler

Deputy Clerk

THOMAS R. ANGEL, et al., Plaintiffs and appellants, v. LOUIS H. RENN, et al., Defendants and Respondents.	4 Civ. No. 24901 (Super. Ct. No. N 14705)

Appeal from a judgment of the Superior Court of San Diego County, Anthony C. Joseph, Judge. Affirmed.

Thomas R. and Loretta C. Angel appeal in pro per from an order of the superior court granting Louis H. and Mildred M. Renn's motion for summary judgment. This is the second time this court has considered the Angels' appeal. (4 Civ. 18610.)

On September 27, 1978, the Angels stipulated to settlement in their suit against the Renns for specific performance of a real estate sale. The court accepted the settlement and judgment was enter-

ed. The settlement called for a $2,000 promissory note with interest due and payable upon the sale of the subject property. The Angels waived their right to appeal. On October 23, 1978, the Angels moved to set aside the judgment under Civil Code section 473 on the grounds they had received erroneous advice from their lawyer. This motion was denied on November 3, 1978. The Angels appealed to this court; the judgment was affirmed. Two petitions for rehearing were denied as was a petition for hearing at the California Supreme Court. Several writs followed, including a petition for writ of certiorari in the Supreme Court of the United States, denied November 16, 1981. (See Nos. 22866, 18622 and 18129.)

The Angels returned to the lower court and filed the instant action to set aside the judgment for extrinsic fraud. The trial court granted the Renns' motion for summary judgment finding the action was "an attempt to redetermine the conclusion of Judge Froehlich on the motion for nonsuit in the prior case." The court also found there was no triable issue of fact because "[t]he sole basis of plaintiffs' action is inference and supposition." The Angels ask

us to review the grant of summary judgment.

DISCUSSION

We are again asked to set aside the stipulated judgment entered September 27, 1978. At the heart of this controversy is the Angels' contention their attorney, Kevin Midlam, was not authorized to accept the proposed settlement. The Angels say they agreed to settle for $2,000 cash. The next day at trial Midlam accepted a $2,000 promissory note. The Angels claimed this settlement was outside Midlam's authority and now argue extrinsic fraud. Loretta Angel stated this fraud is based on an "assumption" Midlam's performance at trial was so bad it had to be purposeful; his standard of care so low it was clearly fraudulent. In an ever widening maelstrom of accusation and suspicion of intrigue, the Angels now attempt to assert the only excuse for Midlam's performance is that he was paid off by the Renns.

I

Code of Civil Procedure section 437, subdivision (c), requires each party submit affidavits showing the existence of admissible evidence to support its contentions. Arguments, speculation, and evidence of

matters beyond the scope of the pleadings will not be considered. (Keniston v. American Nat. Ins. Co., 31 Cal.App.3d 803, 812.) Unsupported conclusions and opinions are no substitution for allegations of fact. (Barker v. Wah Low, 19 Cal.App.3d 710, 713; Southern Pacific Co. v. Fish, 166 Cal.App.2d 353, 362.) The trial court's summary judgment in the instant case is based on the failure of the Angels to state any fact in their moving papers and declarations to support their accusation the Renns offered Midlam money in order to lose the law-suit. The trial court found and our review of the declarations and moving papers support the conclusion there was no showing Midlam's conduct was in any way connected to the Renns.

The trial court asked "What evidence do you have that the Renns had knowledge that Mr. Midlam was deliberately throwing the case, . . . ?" Loretta Angel responded "I make the presumption from the circumstances." The court then asked her to describe what circumstances appearing in the declarations could lead to the conclusion the Renns participated in fraud. The only circumstance Loretta Angel could rely upon was her assertion defendants' counsel

knew Midlam was not authorized to settle for a promissory note but only for cash. Even assuming defendants' counsel was not entitled to rely upon Midlam's stipulation entered on the record in open court, there is no inference arising from this action which would lead a rational trier of fact to conclude the defendants paid Midlam to "throw the case." Assuming Midlam exceeded his authority to enter settlement,[1] and fraudulently defeated his clients' interests, the judgment cannot be set aside unless Midlam's conduct was in some way connected to the Renns. (Westinghouse Credit Corp. v. Wolfer, 10 Cal. App.3d 63, 70; Lennefelt v. Cranston, 231 Cal.App.2d 171, 175.)

We conclude the trial court's ruling was correct. Summary judgment is proper unless the supporting porting papers contain some evidence of fraud or

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[1]Our reading of the record persuades us the dispute is simply whether Midlam's authorization to settle the case for $2,000 included discretion to accept a promissory note. This, apparently, is the conclusion reached by the trial court in the instant action:

"THE COURT: One thing you must remember is there is a distinction, there is a difference between malpractice on the part of your lawyer and extrinsic fraud on the part of your lawyers and the defendants.

deceit. (Cullincini v. Deming, 53 Cal.App.3d 908, 914; Southern Check Exch. v. County of San Diego, 5 Cal.App.3d 81, 84; McHugh v. Howard, 165 Cal.App.2d 169, 176.)

II

The Angels contend the summary judgment must be set aside because there was inadequate opportunity for discovery. At the hearing on the motion for summary judgment, the Angels requested additional time in which to make discovery. The trial court reluctantly granted this extension and described what was required for a factual showing to defeat the motion. The Angels deposed Louis Renn and all of the various attorneys. The only discovery the Angels were unable to complete was the deposition of Mildred Renn. Mildred Renn stated in her declaration her role in the real estate transaction was insignificant

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"Now the fact that Midlam might have not tried the case to your satisfaction or with the expertise that you think that he should have shown doesn't mean that you have extrinsic fraud. All it means is that you might have a cause of action for malpractice."

And, indeed, the Angels are pursuing such a claim in Thomas R. and Loretta C. Angel v. Kevin W. Midlam, Samuel J. Frazier, and Mark S. Dodge, et al., San Diego Superior Court case No. 459055 filed September 24, 1980.

and she agreed to answer written interrogatories. The trial court found on the strength of a declaration by Mildred Renn's doctor her deposition would endanger her health and issued a protective order. Mildred Renn passed away during the pendency of this appeal. We find the moving papers were supported by adequate opportunity for discovery.

III

The Angels' final contention is Code of Civil Procedure section 283 is an unconstitutional grant of authority to counsel because the section "presumes that attorneys are immune to dishonesty and corruption." This argument reads too much into the statute. The statute does not enlarge or abridge the authority of an attorney, it simply prescribes how this authority is exercised. (Preston v. Hill, 50 Cal. 43, 53; City of Fresno v. Baboian, 52 Cal.App. 3d 753, 757; Redsted v. Weiss, 71 Cal.App.2d 660, 663.)

IV

The Renns pose this is a proper case for the imposition of sanctions. They argue this appeal coupled with the Angels' litigious history of filings

directed to the same legal points is simply harass-
7 ment. ⊥

Loretta Angel declared "I gave my word to [my son] that I would not give up and I will not, God as my witness, I will not." And she has not. The issue on this appeal was presented and argued to this court in each of two petitions for rehearing in 4 Civ. 18610. Although the trial court repeatedly questioned the Angels to discover whether there was a single fact or scrap of evidence to support their theory, not a scintiila appeared which has not appeared in the record from the beginning.

The Renns rely on Beckstead v. International Industries, Inc., 127 Cal.App.3d 927. In Beckstead this court held sanctions were proper when the plaintiffs continued to relitigate unsuccessful legal positions because it found the appeal was "motivated solely to harass and annoy." (Id., at p. 930.) The Supreme Court in In re Marraige of Flaherty, 31 Cal. 3d 637, 650, described a two-pronged definition to determine when an appeal is frivolous in order to impose sanctions on the appealing party. The first prong, as in Beckstead, is when an appeal is taken

for an improper motive representing a time consuming and disruptive use of the judicial process. Secondly, an appeal is frivolous "when it indisputably has no merit -- when any reasonable attorney would agree that the appeal is totally and completely without merit. [Citation.]" (Flaherty, at p. 650.) | 8

This appeal has been time consuming and disruptive and a reasonable attorney would acknowledge that it is completely without merit. On June 11, 1981 (4 Civ. No. 24824) this court denied the Angels' writ of certiorari and advised them of the court's "power to impose sanctions for successive, frivolous petitions directed to the same legal points." Does the fact the Angels appear in pro per cause a different result? To decline to impose sanctions in this circumstance is to give a pro per on specific notice of the consequences of a frivolous, meritless appeal, an undue advantage over a lawyer represented litigant. The Angels abuse the appellate process and we therefore impose a sanction of $500.

Judgment affirmed. Angels to pay $500 forthwith to respondents Renns. Signed: STANIFORTH, J.

WE CONCUR: Signed: BROWN, P.J. Signed: WORK, J.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIECO

LOUIS H. RENN, Plaintiff vs. THOMAS R. ANGEL AND LORETTA C. ANGEL, Defendants	F I L E D Robert D. Zumwalt, Clerk MAR 9 1984 Judgment on Verdict In Open Court C.C.P. Sec. 664 No. N 23298

This action came on regularly for trial on the 27TH day of FEBRUARY, 1984. The said parties appeared by their attorneys, PHILIP BURKHARDT, counsel for Plaintiff and THE DEFENDANTS APPEAR IN PROPRIA PERSONA. A jury of TWELVE persons was regularly empaneled and sworn to try said action. Witnesses on the part of Plaintiff and Defendants were sworn and examined. After hearing the evidence, the arguments of counsel, and instructions of the court, the jury retired to consider its verdict; subsequently, all of the jurors returned into court with the verdict signed by the foreman, and duly rendered their verdict in writing in favor of the PLAINTIFF, as follows:

"WE, THE JURY, IN THE ABOVE ENTITLED ACTION FIND IN FAVOR OF THE PLAINTIFF, LOUIS H. RENN AND AGAINST THE DEFENDANTS, THOMAS R. ANGEL AND LORETTA C. ANGEL AND FIX DAMAGES AS FOLLOWS:

SPECIAL DAMAGES	$ 4,331.13
GENERAL DAMAGES	$ 50,000.00
PUNITIVE DAMAGES	$ 100,000.00

DATED: MARCH 9, 1984
14:15 P.M.

JURY FOREMAN

BY /S/ JAMES T. SLOCUM

WHEREFORE, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged and decreed that said PLAINTIFF, LOUIS H. RENN, have and recover from said DEFENDANTS, THOMAS R. ANGEL AND LORETTA C. ANGEL, JUDGMENT IN THE AMOUNT OF $154,331.13 AND costs and disbursements incurred in this action, amounting to the sum of $ _____.

I, the undersigned, Clerk of the Superior Court of San Diego County, do hereby certify the foregoing to be a full, true and correct Judgment entered in the above entitled action.

ATTEST my hand and the seal of said Superior Court, this 9TH day of MARCH, 1984.

ROBERT D. ZUMWALT, Clerk

By /S/ Lillian M. Tusa,

LILLIAN M. TUSA, Deputy Clerk

E N T E R E D

MAR 12 1984

Judgment Book 1557 Pg 216

IN THE SUPREME COURT OF THE
UNITED STATES

CASE NUMBER _____

DECLARATION OF SERVICE BY MAIL
(C.C.P. 1013a and 2015.5)

APPEALS CT 4 Civ 31142

SUPERIOR CT N 8598

I, Tom Angel Jr. declare: That I am, and was at the time of service of the papers herein referred to, over the age of eighteen years, and not a party to the action; and I am residing in the County of San Diego, California, in which county the within-mentioned mailing occurred. My residence address is Post Office Box 753 Rancho Santa Fe, California. I served the within

PETITION TO THE UNITED STATES SUPREME COURT: An original and 39 copies on the United States Supreme Court as follows: Clerk, U.S. Supreme Court, Washington, D.C. 20543

of which true and correct copies of the document filed in the cause is affixed by placing three copies thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

California Supreme Court
4250 State Building
San Francisco, CA 94102

Court of Appeal
1350 Front Street
Room 6010
San Diego, CA 92101

Judge Anthony C. Joseph
Superior Court
325 Melrose Drive
Vista, CA

Philip Burkhardt
Post Office Box 1369
Rancho Santa Fe, CA
92067

I then sealed each envelope and, with the postage thereon fully prepaid, deposited each in the United States mail at Rancho Santa Fe, CA, on August 10, 1984. I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 10, 1984, at Rancho Santa Fe, California.

_____